



ARKANSAS JUDICIARY

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Rule 27. Depositions Before Action Or Pending Appeal.

(a) Before Action.

(1) **Petition.** A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court in this state but is presently unable to bring it or cause it to be brought; (2) the subject matter of the expected action and his interest therein; (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) **Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing, the notice shall be served either within or without the state in the manner provided in Rule 4 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent, the provisions of Rule 17(b) apply.

(3) **Order and Examination.** If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the deposition shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules, and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) **Use of Deposition.** If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in the courts of this state, it may be used in any action involving the same subject matter subsequently brought in a circuit court of this state in accordance with the provisions of Rule 32(a).

(b) **Pending Appeal.** If an appeal has been taken from a judgment of a circuit court or before

the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the circuit court for leave to take the depositions, upon the same notice and service thereof as if the same were pending in that court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure of justice, it may make an order allowing the depositions to and may make orders of the character provided for by Rule 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed these rules for depositions taken in actions pending in the circuit court.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Reporter's Notes to Rule 27: - 1. With minor wording changes to accommodate it to state practice, Rule 27 is essentially the same as FRCP 27. It is likewise essentially the same as superseded Ark. Stat. Ann. 28-349 (Repl. 1962), and thus works no change in Arkansas practice and procedure.

2. Except under this rule, a person must actually have commenced suit and be involved in litigation before the usual discovery tools are available to him. *B & C Tire Co. v. Internal Revenue Service*, 376 F. Supp. 708 (D. C. Ala., 1974). This rule in no way determines substantive rights, but merely provides an aid in the eventual adjudication of such rights in an action to be commenced later. *Mosseller v. United States*, 158 F.2d 380 (C.C.A. 2nd, 1946).

Addition to Reporter's Notes, 2001 Amendment: - The reference to chancery courts in subdivision (a)(4) has been deleted in light of Constitutional Amendment 80, which established circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts. Also, the references to "trial court" in subdivision (b) have been changed to "circuit court" or "court."

History Text:

History. Amended May 24, 2001, effective July 1, 2001

Associated Court Rules:

Rules of Civil Procedure

Group Title:

V. Depositions and Discovery

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